IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted]

Term, 196[illegible]

EUGENE DONALD METZ — Petitioner

versus

UNITED STATES OF AMERICA — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN Y. BROWN

WESTERFIELD PRINTING CO., INCORPORATED, LOUISVILLE

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

_____Term, 1963

EUGENE DONALD METZ, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Eugene Donald Metz, respectfully prays that this honorable Court cause a Writ of Certiorari to be issued to review the final Orders and Judment of the United States Court of Appeals, for the Sixth Circuit, which judgment was entered on April 30, 1963.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 312 Fed. 2d 199.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on January 22, 1963, and an Order overruling petitioner's motion for a rehearing *en banc* was entered on April

30, 1963. Copies of both are appended to the petition and appear in the Appendix at page 12. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED.

Your petitioner was convicted of conspiracy to violate the Mann Act and violation of said Act. The only witness against the petitioner who testified as to the alleged transportation across a state line was a 15 year old girl who, instead of accusing the defendant of the offense charged, denied that defendant was guilty as charged in the indictment.

With no showing of hostility, the trial Court permitted the district attorney to cross-examine this witness. The basis of the cross-examination was a written statement purportedly given by the witness to an F.B.I. agent, without counsel for the defendant being given an opportunity to see the statement prior to cross-examination. The questions involved are: (1) Can the government impeach its own witness by statements allegedly made to a third person at variance with her testimony, when the witness denies the truthfulness of such previous statements and can the government rest its case without offering the statement or the witness to whom said previous statements had been made, or, in substance, can contradictions be considered substantive proof?

(2) Article VI of the Constitution of the United States guarantees to any person the right to be confronted by the witnesses that accuse them. It is the

contention of the petitioner that the right of confrontation is no more important than the right to have the witness accuse, and in this instance the witness confronted the petitioner but did not accuse him. The question here involved is the denial of the constitutional right of this defendant to be accused by the witness that confronts him and not have that accusation merely contained in questions asked by the district attorney but denied by the witness.

(3) Whether the court erred in failing to instruct the jury that in order to convict the defendant, the unlawful purpose of which he is accused must have been his immoral purpose and not merely that of the female involved.

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Article VI, which is set forth in the Appendix at page 11.

Petitioner submits that the above section of the Constitution provides plainly and explicitly that not only must the witness confront a defendant, but such witness must accuse him, and this means that the accusation must be based on the voluntary statements and not on contradictions suggested by questions of the attorney, with no proof that such contradictory statements ever were made.

STATEMENTS

The petitioner and Kenneth Eugene Miller were indicted and convicted of the offense of conspiring unlawfully to transport a female in interstate commerce for immoral purposes (18 USC, Section 371 and 2421). Each received a five year sentence. Petitioner was also convicted of the offense of unlawfully transporting a female in interstate commerce (18 USC, Section 2421). For this he received an additional five year sentence.

The only witness for the government who could have testified to facts making out the charge was the witness Mae Deloris Garland and instead of accusing this petitioner in her direct testimony, she not only did not accuse but, in every instance, absolved this petitioner of any violation as charged. In fact, in the certified record, pages 11A through 14A, her testimony completely proves the innocence of this petitioner. At this point the district attorney asked the Court for permission to consider the witness a hostile witness and to be allowed to cross-examine her. Without any proof of hostility and over the objection of defense counsel, the court granted such permission. Moreover, the trial judge refused counsel for petitioner the right to see the statement on which such cross-examination was based until the government had completed its cross-examination.

The district attorney then asked the following questions as if they were contained in the statement pre-

viously given to F.B.I. Agent Barry, and each question was denied or, at least, not admitted:

(a) "Gene (defendant Metz) made a telephone call to Chicago, which he told me was to a friend of his to make arrangements for me in Chicago." Witness Garland denied that she had said this (A. 21a).

(b) "After he called this person, he told me that the arrangements were all made." The witness did not admit making this statement (A. 22a).

(c) "That before Gene (Metz) left he said that Blackie would tell me what to do and just to go along with him." Witness denied it had happened "exactly like that", stated that Metz had simply said that Blackie would help her but that Metz would have to ask him to do so, and did not admit making the statement attributed to her (A. 23a).

(d) "That defendant Metz had been present at the time that Miller told witness that she had better go back to Newport to avoid trouble for him, and that she should say, if asked, that she had come to Chicago by bus. The witness denied that she had said this, and stated that Metz had already left Chicago at the time of this conversation (A. 28a, 29a).

(e) "That defendant Metz had talked to witness on the way to Chicago about her engaging in prostitution. The witness flatly denied that she had said any such thing to Barry (A. 33a)."

The prosecution, after the above questions had been asked and denied, then suggested to the witness that the defendants' attorney had talked to her and the

suggestion that someone had advised her not to tell the truth here in Court and then, in the finest form of a Perry Mason television Court room trial, he clinches his point, for which he has no proof, by saying: "You are sure of that" and again the witness insists that she is "positive."

That a conviction cannot rest on mere impeachment of a witness is fundamental in any idea of a fair trial. For a witness to exonerate an accused and then by inference and innuendo to be proved a liar, is not proof of a defendant's guilt. See Eisenberg v. United States, 5th Circuit, 1959, 273 Fed. 2d 127-130.

In a civil case where the same tactics were used, the Court had this to say:

> "By contradicting the witness in this fashion, the plaintiff got into the record and before the jury matter which was not evidence at all. Its admission, we are constrained to find, was error." Philadelphia & R. Railway Company v. Bartsch, 3rd Circuit, 1925, 97 F. 2d 858, 861.

The United States Court of Appeals for the Sixth Circuit summarily disposed of the contentions raised above, both in the original opinion and in the order overruling the petition for rehearing.

REASONS FOR GRANTING WRIT.

The Supreme Court of the United States has a long and enviable record of protecting the rights of defendants in criminal cases. A "shuffling Sam" in a bus station, accused of loitering, finds a friendly hearing in this Court. If the practice engaged in in this case should become the precedent for future trials, no defendant could ever feel that he would receive a fair trial in a federal Court. Your petitioner herein is arbitrarily denied the right of being confronted by a witness that accuses him. It is not enough to confront a defendant with a witness and then to contend that when the witness does not accuse him in open court, to prove the case by showing that the witness accused the defendant at a former time in a statement, which is not offered in evidence and is not supported by proof.

For the following reasons the Court should grant this petition:

(1) Every defendant has the right under Article VI of the Constitution of the United States not only to be confronted but accused. In this case a reading of the record, which is brief, shows these undisputed facts:

(a) The witness, Mae Deloris Garland, was the chief government witness and the only one connecting this defendant with the offense charged.

(b) The witness, Mae Deloris Garland, did not accuse the defendant, but rather absolved him from blame and the only accusation is contained

in the questions asked by the District Attorney in a Perry Mason fashion and then not supported by the person to whom the contradictory statements are supposed to have been made.

(c) In fact, the witness, Mae Deloris Garland, on direct examination, proved the petitioner innocent of the crime charged.

(d) With no showing of hostility, the trial judge permitted the district attorney to cross-examine and impeach his own witness by innuendo contained in questions and then not supported by any testimony as to the truth of said contradictions.

(e) The trial Court refused petitioner a copy of the statement on which the cross-examination was made until after the government had questioned the witness.

That the conviction in this case is based upon the district attorney's questions, which contain statements upon which guilt could be based, is undeniable. There is no direct testimony of the witness. The statement containing the contradictions should have been given to the defendant prior to the government's cross-examination.

See Morris v. United States (CCA 5th), 149 Fed. 123, 14 American Jurisprudence, Criminal Law, Section 182, page 893; Green v. McElroy, 360 U. S. 474, 79 Supreme Court 1400, 3 L. Ed. 2d 1377.

The constitutional right of confrontation is an historical one, being based on common law principles. It is present in our Federal Bill of Rights and is also present in many state constitutions and statutes. The

primary object of confrontation is to compel the accuser to meet face to face with the defendant and to permit free, complete and uninhibited cross-examination. Its secondary object is to permit the jury to observe the demeanor of both parties, especially the witness.

Kirby v. U. S., 174 U. S. 47, 19 S. Ct. 574, 43 L. Ed. 890;

Mattox v. U. S., 156 U. S. 237, 15 S. Ct. 337, 39 L. Ed. 409.

To permit a government witness to testify from a paper, or statement, without first permitting the defendant to see said document, depriyes the defendant the full and unfettered right to be confronted with the witness against him and also deprives him of the full right to defend himself. Morris v. United States, *supra*.

In the present case, it requires no stretch of the mind to see that it was the *statement* of the witness that was the basis of the jury's verdict. The statement was, in effect, the only government witness. Its introduction into the case was improper, due to a lack of showing of hostility. Then, the trial Court refused to permit counsel for petitioner to see it, prior to the government's impeachment. The entire transcript shows that the witness testified reluctantly, under force, coercion and duress. The government *made her say what was in that written statement*. A confrontation of an accuser, under such circumstances, certainly does not comply with the letter, or spirit, of the Sixth

Amendment. A witness for the government, especially in a criminal case, should be permitted to testify, under oath, freely and fully. For this Court to permit such tactics is to do violence to all principles of justice.

(2) The petitioner sought and was refused an instruction to the effect that a Mann Act defendant has a right to have a jury instructed that the unlawful purpose must be his, not merely his passenger's, in order to justify a conviction. The failure to give this instruction was reversible error. See Mafaga v. United States, 57 Fed. 2d 822.

CONCLUSION.

For the reasons above set out, we respectfully submit that this petition for Writ of Certiorari should be granted.

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Lexington, Kentucky.

Attorney for Petitioner.

APPENDIX

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Nos. 14881-14882

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

EUGENE DONALD METZ and KENNETH EUGENE MILLER, *Defendants-Appellants.*

Appeal from the United States District Court for the Eastern District of Kentucky, at Covington.

(Decided January 22, 1963)

Before: Cecil, Chief Judge, O'Sullivan, Circuit Judge, William E. Miller, District Judge.

Per Curiam. The appellants, Eugene Donald Metz and Kenneth Eugene Miller, were tried in the United States District Court for the Eastern District of Kentucky on the first count of an indictment charging them with conspiracy to violate Section 2421, Title 18, U.S.C., by knowingly transporting Mae Deloris Garland from the Eastern District of Kentucky to Chicago, Illinois, for the purpose of prostitution and debauchery.

Metz was charged, in count two of the indictment, with the substantive offense of transporting the girl, in interstate commerce, from Newport, Kentucky, to Chicago, Illinois, for prostitution, debauchery and other immoral purposes.

The case was tried to a jury and a verdict of guilty was returned against both appellants on count one, and against Metz on count two. Neither of the appellants testified on his own behalf, nor were any witnesses offered in their defense. The appellants were each sentenced to five years imprisonment on count one and Metz was sentenced to five years on the second count, to run concurrently with his sentence on the first count.

The appeals were submitted to this Court on the record of the trial in the District Court and the oral arguments and briefs of counsel.

The assignments of error on behalf of both appellants are failure of the government to establish a prima facie case on the charge of conspiracy; failure to prove venue in the Eastern District of Kentucky, and improper use, for cross-examination, of a statement given by Mae Deloris Garland to an F. B. I. agent.

It is further claimed that there was a failure to identify the defendant Kenneth Eugene Miller as the person who committed the offense charged. And it is claimed on behalf of Metz that the Court erred in failing to give an instruction to the jury requested by counsel on the question of intent and motivation in connection with the transportation.

From an examination of the transcript of all the evidence taken at the trial, we conclude that the government established a prima facie case on the questions of conspiracy and venue. There is evidence, direct and circumstantial, from which the jury could draw logical inferences that the appellant Metz entered into a conspiracy with one Blackie to commit the offense charged in count one of the indictment. In the absence of any evidence to the contrary, the jury was entitled to believe the evidence offered by the government and to draw logical inferences therefrom.

The instructions of the trial judge, with reference to the offenses charged, the essential elements thereof and

the relation of each defendant to the crimes charged in the indictment, are adequate and proper. We find no prejudicial error to either defendant in the manner in which the statement of Mae Deloris Garland to the F. B. I. agent was used. No substantial rights were affected. Rule 52, Rules of Criminal Procedure.

The co-conspirator of Metz is referred to throughout the testimony of Garland, the prosecuting witness, as Blackie. Trial Counsel for the government also refers to him as Blackie. Metz testified that he knew a Blackie Miller in Chicago and that he always saw him when he went to Chicago. Nowhere in the record do we find any connection between Blackie or Blackie Miller and the Kenneth Eugene Miller, who stood trial in this case. For this reason, the judgment of conviction of the appellant, Kenneth Eugene Miller, is reversed and his case remanded to the District Court for further proceeding in conformity with this opinion.

The judgment of conviction of the appellant, Eugene Donald Metz, is affirmed.

ORDER—Filed April 30, 1963.

This cause is before the Court on petition of the defendant-appellant, Eugene Donald Metz, for a rehearing *en banc*.

The principal question involved in this appeal is whether there was sufficient evidence introduced by the government to establish a prima facie case on all of the issues presented by count one of the indictment against the appellant Metz. The sufficiency of the evidence was not challenged on count two of the indictment. The challenge to this count was the failure of the trial judge to give an instruction requested by counsel for Metz.

The Court found on a review of the whole record that the evidence offered and the logical inferences which the jury might draw therefrom were sufficient to make a prima facie case on the questions of conspiracy and venue. This was a factual issue. No inferences were drawn by this Court from the fact that the defendant offered no evidence in support of his claims and that he did not himself testify on his own behalf. This fact was alluded to in paragraph three of the opinion along with other statements showing the nature and history of the trial.

The substance of written request No. 7, tendered by counsel for Metz, which the trial judge refused to give, was adequately covered in the general charge. Appellants' App. 71a-73a. A trial judge is not required to give a requested charge in the language in which it is presented, if the subject is correctly covered in substance in the general charge. Rule 30 F.R. Cr. P. *Davis* v. *United States*, 226 F. 2d 331, 336, C.A. 6; cert. denied 350 U. S. 965; *Henderson* v. *United States*, 218 F. 2d 14, 18, C.A. 6; cert. denied 349 U. S. 920; 4 Federal Practice and Procedure (Barron), Sec. 2234 p. 246 (1951).

Counsel for appellant Metz states in the petition for rehearing "There is no such statement". This is directed at the opinion wherein reference is made to a statement given by Mae Deboris Garland to an F. B. I. agent. Miss Garland says she gave F. B. I. agent Barry a statement (p. 17 tr.). Mr. Howell requested a copy of it (p. 18 tr.). The Court ordered it given to defense counsel (p. 21 tr.). It is evident that counsel had the statement after Miss Garland finished testifying (p. 57 tr.).

We find no questions presented by the petition for rehearing not already decided by the Court in its opinion of January 22, 1963. The decision of the Court on this appeal is based solely on the facts pertinent to this particular case.

No principle of law is established herein to serve as precedent for future action of the Court.

It is ordered that the petition for rehearing *en banc* and the petition for rehearing be and the same are hereby denied.

(s) Lester L. Cecil, Chief Judge.

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No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1963

EUGENE DONALD MIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 174

EUGENE DONALD METZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–16) is reported at 312 F. 2d 199.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1963. A petition for rehearing en banc was denied on April 30, 1963. The petition for a writ of certiorari was filed on May 31, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

891-179—63—1

QUESTIONS PRESENTED

1. Whether the United States Attorney was properly permitted to cross-examine a government witness on the basis of her previous written statement.

2. Whether petitioner's conviction was based upon affirmative admissible evidence.

3. Whether the trial court gave proper instructions upon the element of intent in a prosecution for the interstate transportation of a girl for immoral purposes.

STATEMENT

An indictment in two counts charged petitioner and Kenneth Eugene Miller, alias "Blackie", with conspiracy to violate the Mann Act, 18 U.S.C. 242 (Count 1), and petitioner alone with the substantive violation by transporting a girl from Newport, Kentucky, to Chicago, Illinois, on March 29, 1961, for the purpose of prostitution (R. 3–5). After a jury trial in the United States District Court for the Eastern District of Kentucky, both defendants were found guilty as charged. Petitioner was sentenced to concurrent terms of five years' imprisonment (R. 82). The court of appeals affirmed as to petitioner, but reversed as to Miller, holding that his identity as the individual referred to as "Blackie" had been insufficiently established (312 F. 2d 199).

The principal government witness was Miss Mae Deloris Garland, the alleged victim, age fifteen at the time of trial. Miss Garland was reluctant to testify as to some matters and the court granted the Assistant United States Attorney permission to cross-examine her as a hostile witness (R. 11, 12, 15). She did testify to the following facts. On the evening

of March 28, 1961 (although she was not positive about the date (R. 22)) at the "Silver Slipper", a night club in Newport, Kentucky (R. 12, 21, 30), she was introduced to petitioner, who said something about going to Chicago on some kind of business. Miss Garland asked to go along, but petitioner said he was afraid that he might get into trouble if he took her. She told him that she was nineteen years old and he agreed to take her (R. 43; 17).

Petitioner said that "Blackie" would help her out in Chicago, but that she would have to talk to him (R. 23). Petitioner gave her about ten dollars and they left for Chicago that night (R. 17, 30, 33). When they arrived, petitioner took her to a hotel and introduced her to Blackie as "Susie". Petitioner asked Blackie whether she would be "all right", to which Blackie replied that she was "fine" (R. 18-20). Blackie told her that she was supposed to work as a prostitute (R. 23). He had her hair fixed and assisted her with some necessary shopping. He then took her out on Highway 87 to a house where two other girls worked and told the man in charge that she would work there (R. 23-26). Using the name "Susie Carter", she engaged in prostitution for about two days, paying part of her money to Blackie (R. 25-28). Blackie then told her that she had better return to Newport, that he was afraid he would get in trouble (R. 28). There was no cross-examination of the witness.

A filling station operator and a bartender, both of whom were employed on Highway 87, testified that

Miss Garland engaged in prostitution (R. 37–38, 40–41). There was evidence of a telephone call from petitioner's residence in Mount Healthy, Ohio, to the residence of Kenneth Eugene Miller in Chicago, on March 29, 1961, and a call from the Miller residence to petitioner's residence on the same date (R. 45–49). An F.B.I. agent testified that in the course of an interview with petitioner, the latter stated that he had known Blackie Miller in Chicago for several years and always visited him when he was in Chicago (R. 54).

ARGUMENT

Cross-examination of Miss Garland as a hostile witness based upon her prior written statement to the F.B.I. agent was entirely proper in the circumstances. She was an obviously reluctant witness, who was unwilling even to give the place of her residence until specifically directed to do so by the court. Petitioner's contention that his conviction rests on Miss Garland's prior statement is incorrect. The positive testimony which she gave in open court did show conduct by petitioner which justified the jury's conclusion that he took her from Kentucky to Chicago for the purpose of having her engage in prostitution.[1]

Equally lacking in merit is the contention that the jury was inadequately instructed that the unlawful

[1] Her testimony also supported the inference that he conspired so to do with a person to whom Miss Garland referred only as "Blackie". However, this is not important, in view of the concurrent nature of the sentences imposed.

purpose of the transportation must have been that of petitioner, rather than of the victim. The charge to this effect was explicit and incapable of being misunderstood.[*]

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[*] The court's charge included the following (R. 72-73):

"You are instructed that if the evidence discloses that the defendant Metz did not transport Doloris Garland from the Eastern District of Kentucky to Chicago, Illinois, with the intent that she should there engage in prostitution or other immoral practices, then you must find the defendant Metz not guilty.

"Now, that is simply this, any person may take a woman from one state to another, that doesn't mean that you can't transport a woman from one state to another, and Metz had a right to take this girl if she wanted to go, as far as this case is concerned, to Chicago or New York or any place else, if he had no intent in his mind at the time she was going along with him or at the time that he left the State of Kentucky, of subjecting her to prostitution or immorality. In other words, any one of you might take a neighbor girl to Cincinnati. That wouldn't mean because you had crossed the state line that you had violated the white slave law. And so Metz' intention, according to the statement of his counsel, is if she went along with him, it was with no intention on his part of doing any more than giving her a ride to Chicago and he didn't know what she was going to do when he got there and he asked her, and if he gave her any money, it was only out of a philanthropic spirit of seeing her through until—for a few days until she could find a job, but he had no idea of prostituting her or using her in any way or causing her in any way to engages in immorality or prostitution or debauchery." See also R. 69, 70, 75, 76, 77, 78.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1963.